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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	DOCKET FILE COPY ORIGINAL
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Implementation of the Satellite Home Viewer Improvement Act of 1999	)	CS Docket No. 99-363
	)	
Retransmission Consent Issues	)	

REPLY COMMENTS OF BELLSOUTH CORPORATION, BELLSOUTH INTERACTIVE MEDIA SERVICES, INC. AND BELLSOUTH WIRELESS CABLE, INC.

William B. Barfield
Thompson T. Rawls, II
Suite 1800
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(770) 673-2827

THEIR ATTORNEYS

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EXECUTIVE SUMMARY

The core position of the national television networks and their affiliates in this proceeding is very straightforward: so long as a network or a local television station does not refuse to come to the bargaining table and negotiate a retransmission consent agreement with an alternative multichannel video programming distributor ("MVPD"), Section 1009(a) of the Satellite Home Viewer Improvement Act of 1999 (the "1999 Act") permits the network/local station to withhold retransmission consent if the alternative MVPD does not agree to any discriminatory and anticompetitive terms and conditions. By contrast, alternative MVPDs have asked the Commission to interpret Section 1009(a) in accordance with the broader pro-competitive objectives of the 1999 Act, so that all MVPD competitors of incumbent cable operators will be accorded maximum protection where those operators attempt to extract discriminatory and anticompetitive retransmission consent agreements from the networks and/or local television stations.

Though representatives of the television industry vigorously argue otherwise, the legislative history of the 1999 Act indeed reflects that Congress was concerned about the effect of anticompetitive retransmission consent agreements on alternative MVPDs and their customers, and the Commission therefore is not at liberty to ignore such agreements simply to enhance the competitive position of local television stations and cable incumbents. Had Congress thought it sufficient for broadcasters to do nothing more than come to the bargaining table, it would have written Section 1009(a) to require the broadcasters to bargain in "good faith," *without any further qualification.* That, however, is not how Congress wrote the statute: instead, Section 1009(a) states that where a broadcaster offers retransmission consent to different MVPDs under different terms and conditions, such differences must be justified by "competitive marketplace considerations." By its very terms, the phrase "competitive marketplace considerations" categorically prohibits discriminatory retransmission consent agreements that are based on *anti*competitive marketplace considerations, and thus it makes no sense whatsoever to read Section 1009(a) as giving the networks and/or local television stations *carte blanche* to force alternative MVPDs into accepting discriminatory and anticompetitive terms and conditions as a *quid pro quo* for retransmission consent.

Moreover, the broadcasters' arguments as to their supposed economic incentive to enter into retransmission consent agreements with all MVPDs in local markets are entirely disingenuous. It is well known that NBC and CBS have surrendered exclusivity to incumbent cable operators for the MSNBC and Eye on People cable networks in order to secure carriage of NBC and CBS television stations, respectively, and there is nothing in the record of this proceeding which suggests that a different result would obtain if incumbent cable operators were to demand exclusive or otherwise discriminatory retransmission consent agreements with respect to NBC or CBS broadcast programming. The simple fact is that a local network station has virtually no incentive to enter into a retransmission consent agreement with an alternative MVPD that controls relatively few subscribers, since the station can easily reclaim those subscribers to the extent that they abandon the alternative MVPD and elect to purchase service from the incumbent cable operator who, by virtue of its market power has already secured any retransmission consent agreements necessary to ensure uninterrupted delivery of local broadcast programming to its subscribers.

Finally, contrary to what has been suggested by various broadcasters in this proceeding, the Commission may accomplish the public policy objectives of the 1999 Act *without* adopting retransmission consent complaint procedures that require invasive discovery of a defendant broadcaster's confidential documents. As noted in BellSouth's initial comments, the Commission can and should adopt complaint procedures that are *less* burdensome to the Commission's staff than those already established in the 1999 Act, and which merely require a defendant broadcaster to produce with its answer the retransmission consent agreement that is the basis of the alternative MVPD's complaint. In this way, discovery is limited exclusively to those documents that are essential to a full and fair review of the underlying complaint, without requiring the Commission's staff to devote scarce resources to designing discovery procedures unique to each and every retransmission consent complaint before it.

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BellSouth Corporation and its subsidiaries, BellSouth Interactive Media Services, Inc. and BellSouth Wireless Cable, Inc. (hereinafter referred to collectively as "BellSouth"), by their attorneys, hereby file their reply comments with respect to the Commission's *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned proceeding.

I. INTRODUCTION.

There is a fundamental disagreement in this proceeding between commercial television broadcasters and alternative multichannel video programming distributors ("MVPDs") as to how the Commission should define the terms "good faith" and "competitive marketplace considerations" in Section 1009(a) of the Satellite Home Viewer Improvement Act of 1999 (the "1999 Act"). That disagreement arises from the broadcasters' refusal to acknowledge that the term "competitive marketplace considerations" is in fact in the statute and imposes on broadcasters a higher standard of conduct during the retransmission consent process than "good faith" standing alone. The broadcasters also fail to acknowledge that Congress accorded the Commission broad discretion to define "competitive marketplace considerations" as necessary to ensure that MVPDs with no market power are not denied competitively fair access to local television programming. The notion that Congress intended otherwise flies in the face of common sense and cannot be reconciled with Congress's repeated attempts to promote full and fair competition between incumbent cable operators, DBS and other MVPD competitors (*e.g.*, cable overbuilders, wireless cable systems, open video systems, etc.) over the past ten years.[1]

The National Association of Broadcasters ("NAB") and the national television broadcast networks would have the Commission believe that broadcasters have ample incentive to ignore the market dominance of incumbent cable operators and negotiate nondiscriminatory retransmission consent agreements with cable's competitors, on the

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[1] As confirmed in the Commission's Sixth Annual Report on the status of competition in markets for delivery of video programming, incumbent cable operators remain the dominant providers of video programming to consumers in the MVPD marketplace, holding an 82% market share. *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 99-230, FCC 99-418, at ¶ 5 (rel. January 14, 2000) (the "*Sixth Annual Report*"). Moreover, as discussed *infra*, incumbent cable operators have increased their control over distribution in local markets via consolidation of the cable multiple system operators ("MSOs") and the associated "clustering" of local cable systems into larger regional properties controlled by a single entity. *See id.* at ¶ 16 (noting that the seven largest MSOs serve almost 90% of all cable subscribers, and that over 40 million of those subscribers are served by systems included in regional clusters).

theory that a broadcaster must reach every television household in a local market in order to placate its advertisers. History has proven this contention to be false. Broadcasters can and will capitulate to incumbent cable operators and deny cable's competitors access to programming where the Commission's rules permit them to do so, and it is for this reason that Congress added the "competitive marketplace considerations" language to Section 1009(a). Simply stated, the phrase "competitive marketplace considerations" precludes broadcasters from conditioning retransmission consent on discriminatory terms and conditions that have an *anti*competitive effect on alternative MVPDs. For the reasons set forth herein and in BellSouth's initial comments, the best interests of consumers demand that the Commission's rules implementing Section 1009(a) be written accordingly.

II. DISCUSSION.

A. The Term "Competitive Marketplace Considerations" Categorically Prohibits Broadcasters From Imposing On Alternative MVPDs Discriminatory Retransmission Consent Agreements That Are Anticompetitive.

First and foremost, the Commission's interpretation of Section 1009(a) must begin with the basic premise that television broadcast programming is an indispensable component of any MVPD's service package, and that alternative MVPDs cannot compete effectively with incumbent cable operators if they are denied full and fair access to that programming in local markets.[2] Indeed, the Commission very recently noted that "[c]onsumers continue to report that the primary disadvantage of DBS is the lack of network television signals,"[3] and that complaint would apply with equal force to any other alternative MVPD that is denied the right to carry local broadcast stations on nondiscriminatory terms and conditions. It is for this very reason that Section 1009(a) explicitly requires a broadcaster to negotiate its retransmission consent agreements in "good faith," and any agreements that include different terms and conditions for different MVPDs do not qualify as "good faith" unless such differences are based on "competitive marketplace considerations."

Not surprisingly, the broadcasters urge the Commission to read the term "good faith" in isolation and effectively treat the phrase "competitive marketplace considerations" as if it is not in the statute.[4] Of course, had Congress intended that the statute be interpreted in this manner, it would not have bothered to include the phrase

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[2] *See Public Interest Obligations of TV Broadcast Licensees*, MM Docket No. 99-360, FCC 99-390, at ¶ 1 (rel. December 20, 1999) ("Television is the primary source of news and information to Americans, and provides hours of entertainment every week. In particular, children spend far more time watching television than they spend with any other type of media. Those who broadcast television programming thus have a significant impact on society.").

[3] *Sixth Annual Report* at ¶ 74.

[4] *See, e.g.,* Comments of National Broadcasting Company, Inc. at 6-9 (the "NBC Comments"); Joint Comments of the ABC, CBS, Fox and NBC Television Network Affiliate Associations at 15-19 (the "Network Affiliate Comments"); Comments of the National Association of Broadcasters at 19-22 (the "NAB Comments"); Comments of CBS Corporation at 12-14 (the "CBS Comments").

"competitive marketplace considerations" in Section 1009(a). The broadcasters' reading of the statute thus violates the well-established judicial principle that when interpreting federal statutes, effect must be given to every word where possible.[5] Absent further direction from Congress, the Commission has no authority to nullify Congress's reference to "competitive marketplace considerations" in Section 1009(a).

Moreover, in those few instances where the broadcasters deign to attach a meaning to the phrase "competitive marketplace considerations," they assert that the phrase refers exclusively to what is in the best competitive interests of the national television networks and/or local television stations, without regard to the impact of discriminatory or unreasonable retransmission consent agreements on consumers who desire a *bona fide* choice of DBS and non-DBS MVPDs in local markets.[6] The legislative history of Section 1009(a) patently reflects otherwise:

> [T]here may be some disagreement as to what exactly this new provision means. At the very least, "competitive marketplace considerations" may simply be interpreted as the normal, everyday jostling that takes place in the business world. At the very most, a "competitive marketplace" would tolerate differences based on legitimate cost justifications, *but not anti-competitive practices such as illegal tying and bundling.*[7]

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[5] *See, e.g., United States v. Bernier*, 954 F.2d 818, 819-20 (2d Cir. 1992), *cert. denied*, 508 U.S. 941, 113 S.Ct. 2417, 124 L.Ed.2d 640 (1993).

[6] *See, e.g.,* Network Affiliate Comments at 20-22.

[7] Statement of Senator Kohl, 145 Cong. Rec. S15017 (daily ed. Nov. 19, 1999) (emphasis added).

The italicized language quoted above merely reaffirms what is already clear in Section 1009(a): by its very terms, the phrase "competitive marketplace considerations" categorically precludes a broadcaster from extracting "*anti*competitive" retransmission consent agreements from alternative MVPDs. Moreover, since Congress chose not to define "competitive marketplace considerations" in the statute, the Commission has wide discretion to define the term as necessary to protect alternative MVPDs and their customers from "anticompetitive" marketplace considerations arising from cable's dominance over distribution of video programming in local markets. For the reasons set forth in BellSouth's initial comments and those of other alternative MVPDs in this proceeding, that discretion should be exercised in favor of MVPD competitors who control only a small portion of the nation's MVPD subscribers and thus do not have negotiating leverage during the retransmission consent process.[8/] As noted by the American Cable Association, which represents small cable operators throughout the United States:

> Faced with unaffordable per-customer costs that broadcasters are attempting to impose on smaller systems, smaller cable businesses have little choice but to forego consent. This leaves smaller cable businesses with only two choices: (1) allow the broadcaster to withdraw its analog signal; or (2) agree to carriage obligations that they know they cannot meet and breach the contract, only to defer cessation of analog carriage and raising the economic stakes associated with litigation and damage awards. Smaller cable businesses and their customers therefore have no meaningful alternative.[9/]

[8/] BellSouth Comments at 8-10.

[9/] ACA Comments at 13.

In sum, there is no merit to the broadcasters' contention that the "good faith" language in Section 1009(a), as modified by the term "competitive marketplace considerations," refers solely to whether a broadcaster merely shows up at the bargaining table as scheduled, regardless of whether the broadcaster's *substantive* position during retransmission consent negotiations is anticompetitive. The Commission's mandate to protect competition under Section 1009(a) and the Communications Act of 1934, as amended, is far broader than that, and must be exercised as aggressively as possible to ensure that alternative MVPDs and their customers do not suffer the consequences of discriminatory, anticompetitive retransmission consent agreements.

B. The Commission Can And Should Incorporate Strong Anti-Discrimination Criteria Into Its Definition Of Good Faith For Purposes Of Section 1009(a).

DBS and non-DBS competitors who have filed comments in this proceeding almost unanimously support the incorporation of strong anti-discrimination criteria into any Commission rules implementing Section 1009(a).[10] The competitors also generally agree that the Commission should develop specific, clearly defined examples of conduct that will constitute *per se* violations of the "good faith" requirement, and thereby facilitate "swift and

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[10] *See, e.g.,* BellSouth Comments at 6-17; Comments of DirecTV, Inc. at 13-15 (the "DirecTV Comments"); Comments of U S WEST, Inc. at 5 (the " U S WEST Comments"); Comments of the American Cable Association at 18-19 (the "ACA Comments"); Comments of Local TV on Satellite, LLC, at 6; Comments of The Wireless Communications Association International, Inc. at 11-15 (the "WCA Comments"); Comments of EchoStar Communications Corporation at 18-19 (the "EchoStar Comments").

effective enforcement thereof."[11] By way of example, BellSouth has asked the Commission to declare that

- any attempt by a broadcaster to impose non-optional tying arrangements on a competing MVPD in exchange for retransmission consent will be deemed a *per se* violation of the "good faith" requirement and shall be actionable as such;[12]

- any attempt by a broadcaster to extract anticompetitive market consideration from an alternative MVPD in exchange for retransmission consent should be deemed a violation of the "good faith" requirement unless the broadcaster sustains a high burden of proof that such consideration is cost-justified and no higher on a per-subscriber basis than what is required of incumbent cable operators against whom the MVPD competes;[13] and,

- any retransmission consent agreement that ties an MVPD's right to carry a local television station to that MVPD's attainment of a minimum subscriber penetration level discriminates against competing MVPDs and in favor of incumbent cable operators, and thereby constitutes a *per se* violation of the "good faith" requirement.[14]

BellSouth also believes that the Commission's Section 1009(a) rules should incorporate the *per se* violations recommended in the initial comments of DirecTV and EchoStar. In particular, and consistent with Senator Kohl's above-quoted admonition that

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[11] *NPRM* at ¶ 15; *see also id.* at ¶ 18 ("Establishing a specific list of *per se* requirements or prohibitions would lend clarity to, and thus expedite, the negotiation process and would do likewise with respect to our enforcement mechanism . . . .") and ¶ 19 ("While we will resolve each case on its own merits, adding specification to our rules should add certainty to the negotiation process and reduce the number of cases presented to the Commission for adjudication.").

[12] BellSouth Comments at 12-13. *See also* Comments of LEXCOM Cable at 2; U S WEST Comments at 5-6; WCA Comments at 14-15; ACA Comments at 18.

[13] *Id.* at 15-16.

[14] *Id.* at 17-18.

Section 1009(a) prohibits illegal tying and bundling arrangements, DirecTV and EchoStar have recommended that the Commission's list of *per se* violations include any non-optional tying of retransmission consent to carriage of a broadcaster's other stations, whether those stations are in the same market or in different markets throughout the United States.[15] Along the same lines, DirecTV, EchoStar and others have requested that *per se* violations include any non-optional tying of retransmission consent to carriage of a broadcaster's digital television ("DTV") signal.[16] As pointed out in BellSouth's initial comments, the tying of retransmission consent to carriage of DTV signals highlights a fundamental inconsistency between the broadcasters' position in the Commission's DTV must-carry proceeding and what they are saying here. That is, if for the sake of argument one agrees with the broadcasters that the public interest in preserving local television service is compelling enough to require a cable overbuilder with no market power to surrender valuable channel capacity to DTV must-carry, then that same public interest should also prohibit a broadcaster from withholding local television service to extract unreasonable

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[15] DirecTV Comments at 9; EchoStar Comments at 12. For example, in the case of a cable overbuilder which operates different systems in multiple markets, this would preclude a broadcaster from forcing the overbuilder into carrying the broadcaster's station in market A as a *quid pro quo* for permitting the overbuilder to carry the broadcaster's station in market B. Of course, broadcasters and alternative MVPDs should be free to enter into such arrangements where they are able to agree on terms and conditions that are acceptable to both parties.

[16] DirecTV Comments at 7-8; EchoStar Comments at 12.

economic concessions from that same overbuilder in exchange for retransmission consent.[17]

Finally, in accordance with the comments submitted by a variety of alternative MVPDs in this docket, BellSouth believes that the Commission can and should refer to the program access nondiscrimination criteria in Section 628(a) of the 1992 Cable Act when defining the parameters of "good faith" retransmission consent negotiations under Section 1009(a).[18] In opposition, the broadcasters cite to the fact that the anti-discrimination language in the House bill was not included in the final version of the 1999 Act, and that the Commission therefore cannot adopt any rules that protect competitors against discriminatory conduct during the retransmission consent process.[19] However, the Commission itself has already acknowledged that Congress intended to impose a "heightened duty of negotiation" on broadcasters during the retransmission consent process, and the legislative history of the 1999 Act indeed confirms that the broadcasters have read far too much into Congress's deletion of the anti-discrimination language from Section 1009(a). In fact, as noted in the statement of Senator Kohl quoted above, Congress was specifically concerned about the impact that anticompetitive retransmission

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[17] BellSouth Comments at 11-12. *See also* ACA Comments at 9 ("These agreements are designed to strong-arm the availability of digital broadcast signals at a time when broadcasters have no endorsement from the federal government to require it. Essentially, tying digital broadcast carriage to analog retransmission consent is the broadcasting industry's jerry-rigged way to achieve digital must-carry.").

[18] *See* WCA Comments at 14; U S WEST Comments at 4-5; DirecTV Comments at 9.

[19] *See, e.g.,* Network Affiliate Comments at 7 n.17; NAB Comments at 16-17; Disney Comments at 9.

consent agreements would have on alternative MVPDs and their customers, and that the Commission's rules implementing the statute can and should prohibit such agreements.[20]

Moreover, the broadcasters deflate their own argument by urging the Commission to permit them to extract consideration from alternative MVPDs based on, *inter alia*, factors such as the size of the MVPD at issue, "the character of the MVPD and its reputation for integrity and adherence to customary business practices," and whether an MVPD is "similarly situated" to other MVPDs with whom an agreement has already been reached.[21] For all practical purposes, these "discussion points" are the exceptions to the general prohibition against discriminatory cable network affiliation agreements, as set forth in Section 628 in the 1992 Cable Act.[22] Yet in the same breath the broadcasters argue that the Commission cannot incorporate Section 628's antidiscrimination language into its definition of "good faith" and/or "competitive marketplace considerations," citing the absence of antidiscrimination language in the final version of Section 1009(a).[23] The results-oriented nature of the broadcasters' argument is obvious: in effect, the broadcasters are contending that it is permissible for the Commission to incorporate Section 628 into its

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[20] *See also* Statement of Senator Hollings, *id.* at 15014-15 ("Language also has been placed in the bill to improve the negotiating position of the satellite companies in their negotiations with broadcasters to obtain programming. Hopefully, this provision will help satellite providers to obtain programming from broadcasters on fair and reasonable terms, and ultimately, provide consumers with service at a competitive price.").

[21] *See* NAB Comments at 23-29; Network Affiliate Comments at 21.

[22] *See* 47 U.S.C. § 548(c)(2)(B)(i)-(iii); 47 C.F.R. § 76.1002.

[23] *See, e.g.,* Disney Comments at 8-9; NAB Comments at 16-17; Network Affiliate Comments at 23.

rules for retransmission consent provided that it selects only those portions of the statute that would benefit the broadcasters exclusively. Again, the broadcasters cannot have it both ways: if local television stations want to take advantage of the exceptions to Section 628 during retransmission consent negotiations, then the pro-competitive intent of Section 1009(a) mandates that the antidiscrimination provisions of the statute be applied with equal force for the benefit of alternative MVPDs during those same negotiations.

C. Incumbent Cable Operators and Broadcasters Have Economic Incentives To Impose Anticompetitive Retransmission Consent Agreements On Alternative MVPDs.

As pointed out in BellSouth's initial comments and confirmed in the Commission's Sixth Annual Report on the status of competition in markets for the delivery of video programming, incumbent cable operators continue to be the dominant providers of multichannel video programming in local markets, and the market power of incumbent cable operators in fact has increased to the extent that consolidation among the cable multiple system operators ("MSOs") forces a local broadcaster to deal with a single cable operator who controls the lion's share of the subscribers in a given local broadcast market.[24/] As a result, local television stations are now even more beholden to incumbent cable operators than they were when the original retransmission consent law was passed in 1992.[25/] On this issue, BellSouth stands in total agreement with the Association of Local Television Stations, Inc.:

[24/] BellSouth Comments at 8-9. *See also Sixth Annual Report,* n. 1 *supra.*

[25/] *Id.*

> Cable systems remain local monopolies with enormous market and bargaining power. With in excess of 60 per cent penetration in most areas, they are an essential lifeline for local television stations. Indeed, the concern has been that cable systems would use their leverage in the market to extract exclusive retransmission agreements from local stations, thereby depriving potential competitors of access to the local station's signal.[26/]

Nonetheless, NAB argues that cable's market power has no bearing on a broadcaster's willingness to negotiate a reasonable retransmission consent agreement with an alternative MVPD, on the theory that television stations need to maximize distribution in order to maximize their advertising revenue.[27/] In a similar vein, NBC argues that "broadcasters have tremendous incentive to reach agreements with each and every [MVPD]," since "[a] broadcast station makes money primarily from the sale of advertising, and the value of that advertising is directly related to the number of people who can receive the signal and watch the programming."[28/] CBS contends that "broadcasters' fundamental economic interest in maximizing the audience for their programming makes it virtually certain that intrusive government regulation of marketplace retransmission negotiations . . . would only rarely result in increased access to broadcast programming for satellite subscribers."[29/]

Ironically, NBC and CBS are excellent examples of why these arguments are wrong. If, as NBC and CBS allege, a broadcaster must obtain distribution from all available

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[26/] ALTV Comments at 2.

[27/] NAB Comments at 1-2.

[28/] NBC Comments at 1-2.

[29/] CBS Comments at 4.

MVPDs in order to maximize its advertising revenue, then this would be equally true of a cable network that relies on subscriber fees and advertising dollars to sustain its operations. Yet as already pointed out by BellSouth, *NBC surrendered exclusivity for the MSNBC cable network to incumbent cable operators in exchange for carriage of NBC broadcast stations.*[30] Similarly, during retransmission consent negotiations for CBS stations, *CBS surrendered exclusivity with respect to its own news-oriented channel, Eye on People.*[31] In other words, when confronted with the dominance of incumbent cable operators in local markets, NBC and CBS abandoned their "maximization of distribution" concept, chose the path of least resistance and acquiesced to the incumbent cable operators' demand that NBC and CBS withhold their cable programming from competing MVPDs. Tellingly, NBC and CBS do not explain why the result would be any different were incumbent cable operators to demand exclusivity with respect to NBC or CBS *broadcast* programming.

Moreover, the "maximization of distribution" argument, as framed by NAB *et al.*, falsely assumes that local broadcasters maximize distribution *only* by obtaining carriage on every MVPD system in a given local market. In reality, and as noted in the comments of the American Cable Association, a local television station loses nothing by refusing to grant retransmission consent to a competing MVPD that has a relatively small number of subscribers:

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[30] BellSouth Comments at 9.

[31] *Id.*

> Broadcasters have continued to offer smaller cable systems retransmission consent for their analog signals on a "take-it-or-leave-it" basis. . . Because the loss of viewers resulting from removal of broadcasters' signals from smaller cable systems will not significantly impact broadcasters' ratings of revenue, broadcasters remain unconcerned whether smaller cable systems carry their signals. *If smaller cable systems are unwilling to accede to broadcasters' carriage demands, broadcasters can simply walk away from negotiations and deny retransmission consent.*[32/].

In fact, as reflected by the following example, the broadcasters actually have an economic *incentive* to impose anticompetitive retransmission consent agreements on alternative MVPDs. Assume that an incumbent cable operator and its next biggest competitor control 80% and 10% of a television market with 100,000 households, meaning that the incumbent and its competitor control 80,000 and 10,000 households, respectively. Since the incumbent controls the lion's share of the households in the market, a local television station has little choice but to enter into a retransmission consent agreement with the incumbent, so as to ensure that its advertisers achieve their desired penetration of the market. By contrast, that same station can well afford to deny retransmission consent to the incumbent's competitor who controls only 10% of the market. This is because the alternative MVPD's subscribers will not tolerate losing access to local television programming for extended periods of time. In most if not all cases, they instead will purchase service from the incumbent cable operator, which, by virtue of its negotiating leverage, will have already secured any retransmission consent agreements necessary to ensure uninterrupted provision of local television programming to *its* subscribers.

[32/] ACA Comments at 13 (emphasis added).

Simply put, an advertiser does not care whether the households delivered by a broadcaster are served by the incumbent cable operator or a competing MVPD, so long as the advertiser achieves its desired penetration of the market. A local television station thus can threaten to withhold retransmission consent from a competing MVPD with little or no economic risk, since it knows that many of the competitor's subscribers will likely migrate to the incumbent, with whom the station already has a retransmission consent agreement. In turn, the weakening of the incumbent cable operator's competitor solidifies the incumbent's control over local distribution, which is precisely the opposite of what Congress was attempting to achieve in the 1999 Act.

D. The Commission Need Not Impose Invasive Discovery Procedures To Regulate Unlawful Retransmission Consent Agreements As Intended By Congress.

Contrary to what is asserted by the broadcasters, Congress did not intend that the Commission assume an entirely passive role in regulating unlawful retransmission consent agreements between television broadcast stations and alternative MVPDs.[33/] Here it is

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[33/] *See* Network Affiliate Comments at 18-20; CBS Comments at 8-9; NBC Comments at 8-9. It is well settled that the Commission "enjoys express statutory authority 'to conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.'" *GTE Service Corporation v. FCC*, 782 F.2d 263, 273 (D.C. Cir. 1985), *quoting* 47 U.S.C. § 154(j). *See also Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) ("This court has upheld in the strongest terms the discretion of regulatory agencies to control the disposition of their caseload.") (citations omitted). By way of example, the Commission recently adopted time limits for processing of program access complaints, even though Congress did not specifically provide for such time limits in Section 628 of the 1992 Cable Act. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd 15822 (1998) (the "*Program Access Procedures Order*").

interesting to note that the broadcasters apparently have no quarrel with the expedited complaint procedures already afforded to *them* under the 1999 Act, or that those procedures require the Commission to adjudicate each and every instance in which a local broadcaster alleges that an MVPD is violating its retransmission consent obligations under the statute. In fact, BellSouth's proposed complaint procedures where an alternative MVPD is the plaintiff are *less* burdensome on the Commission than those already enjoyed by the broadcasters, since BellSouth has recommended that a final decision on an alternative MVPD's complaint be made within 45 days after the close of the pleading cycle, not within 45 days of the filing of the initial complaint.[34/]

Moreover, at no point has BellSouth ever suggested that the Commission's complaint process for retransmission consent be used as a pretext for unwarranted fishing expeditions into a defendant broadcaster's confidential documents.[35/] BellSouth recognizes that the Commission has refused to authorize mandatory discovery where program access is concerned, and thus BellSouth has not revived that proposal here. Rather, BellSouth has merely asked the Commission to recognize the "catch-22" which ensnares an alternative MVPD that files a retransmission consent complaint, *i.e.*, it must present a *prima facie* case to obtain access to critical documents in the broadcaster's

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[34/] Others have similarly recommended that the Commission adopt expedited complaint procedures where the complainant is an alternative MVPD. *See* WCA Comments at 16; U S WEST Comments at 8; EchoStar Comments at 24; DirecTV Comments at 16.

[35/] *Compare, e.g.,* Network Affiliate Comments at 28 ("[T]he Commission should ensure that MVPDs are not able to use the complaint process as a vehicle for harassing broadcasters or other MVPDs with intrusive discovery requests designed primarily to ferret out confidential business information.").

exclusive possession, without which a *prima facie* case cannot be made. To resolve this problem, BellSouth has asked that the Commission require a defendant broadcaster to include with his or her answer a copy of any retransmission consent agreement(s) with any MVPD(s) with whom the complainant competes and that complainant has alleged to include unlawfully different terms and conditions, subject to whatever confidentiality protection the Commission deems appropriate under the circumstances. This procedure will provide the complainant and the Commission with immediate access to the most critical evidence at issue, without burdening the Commission's staff with the task of designing and implementing customized discovery procedures for each and every case before it.

Finally, BellSouth agrees with EchoStar's recommendation that the Commission adopt a liberal policy of allowing an alternative MVPD to recover damages through the retransmission consent complaint process, both as a deterrent to unlawful conduct and as compensation for any economic injury caused by loss of access to broadcast programming.[36/] However, BellSouth also agrees that the Commission should not condition an award of damages on whether a defendant broadcaster has relied on a good faith interpretation of the Commission's Rules implementing Section 1009(a).[37/] In effect, such a rule would permit an aggrieved MVPD to recover damages only where the defendant broadcaster (or the defendant's counsel) leaves a paper trail demonstrating unequivocally that the broadcaster violated the rules with full knowledge that its conduct was illegal. To

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[36/] EchoStar Comments at 23.

[37/] See *id.*, *quoting Program Access Procedures Order* at ¶ 17.

say the least, it is highly unlikely that a defendant broadcaster would be foolish enough to create such a paper trail, and thus tying a damages award to the existence thereof is tantamount to permitting no damages at all.

III. CONCLUSION.

BellSouth reiterates that this proceeding provides the Commission with an unprecedented opportunity to declare that competition among MVPDs will not be thwarted by retransmission consent agreements between broadcasters and incumbent cable operators that deny competitors and their customers nondiscriminatory access to broadcast programming. Given the pro-competitive objectives of the 1999 Act, and before it the Telecommunications Act of 1996 and the 1992 Cable Act, the Commission should reject the pleas of the broadcasters to turn back the clock and implement Section 1009(a) that will only reinforce the dominance of incumbent cable operators in local markets. Instead, the Commission can and should remain on the pro-competitive course charted by

Congress and implement the exclusivity/good faith provisions of the 1999 Act as recommended by BellSouth in this proceeding.

Respectfully submitted,

BELLSOUTH CORPORATION
BELLSOUTH INTERACTIVE MEDIA
SERVICES, INC.
BELLSOUTH WIRELESS CABLE, INC.

By: Thompson T. Rawls II

William B. Barfield
Thompson T. Rawls, II
Suite 1800
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(770) 673-2827

January 21, 2000

ORIGINAL

CERTIFICATE OF SERVICE

I, Thompson T. Rawls, II, hereby certify that I have on this 21st day of January, 2000, caused copies of the foregoing Reply Comments of BellSouth Corporation, BellSouth Interactive Media Services, Inc. and BellSouth Wireless Cable, Inc to be served via First-Class Mail on the following:

James J. Popham
Vice-President, General Counsel
Association of Local Television Stations, Inc.
1320 19th Street, N.W.
Suite 300
Washington, DC 20036

Marvin Rosenberg
Patricia Y. Lee
Counsel for Local TV on Satellite, LLC
Holland & Knight
2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, DC 20037-3202

David K. Moskowitz
Senior Vice President and General Counsel
EchoStar Satellite Corporation
5701 South Santa Fe
Littleton, CO 80120

Philip L. Malet
Pantelis Michalopoulos
Colleen Sechrest
Tekedra McGee
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036

Gary M. Epstein
James H. Barker
Kimberly S. Reindl
Latham & Watkins
1001 Pennslyvania Avenue, N.W.
Suite 1300
Washington, DC 20004-2505

Daniel L. Poole
Norman G. Curtright
US West, Inc.
1020 19th Street, N.W.
Washington, DC 20036

Matthew M. Polka
President
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220

Eric E. Breisach
Christopher C. Cinnamon
Lisa Chandler Cordell
Attorneys for American Cable Association
Bienstock & Clark
5360 Holiday Terrace
Kalamazoo, Michigan 49009

James U. Troup
Robert J. Ungar
Attorneys for LexCom Cable
Arter & Hadden
1801 K Street, N.W.
Suite 400K
Washington, DC 20006

Richard Cotton
Diane Zipursky
National Broadcasting Company, Inc.
1299 Pennsyvlania Avenue, N.W.
Washington, DC 20004

Alan N. Braverman
Sr. Vice President and Gen. Counsel
Counsel for ABC, Inc.
ABC, Inc.
77 West 66th Street
New York, NY 10023

Sam Antar
Vice President, Law & Regulation
Counsel for ABC, Inc.
ABC, Inc.
77 West 66th Street
New York, NY 10023

Lawrence R. Sidman
Jessica Wallace
Counsel for the Walt Disney Co.
Verner, Liipfert, Bernhard, McPherson & Hand, Chtd.
901 15th Street, N.W.
Suite 700
Washington, DC 20005

Diane Hofbauer Davidson, Esq.
Director, Government Relations
The Walt Disney Company
1150 17th Street, N.W.
Suite 400
Washington, DC 20036

Henry L. Baumann
Benjamin F.P. Ivins
National Association of Broadcasters
1771 N Street, N.W.
Washington, DC 20036

Andrew R. Paul
Senior Vice President
Government & Legal Affairs
Satellite Broadcasting & Communications Association
225 Reinekers Lane
Suite 600
Alexandria, VA 22314

Andrew S. Wright
Vice President
Government & Legal Affairs
Satellite Broadcasting & Communications Association
225 Reinekers Lane
Suite 600
Alexandria, VA 22314

Ellen S. Agress
Molly Pauker
Fox Television Stations, Inc.
5151 Wisconsin Avenue, N.W.
Washington, DC 20016

Daniel L. Brenner
Diane B. Burnstein
Michael S. Schooler
National Cable Television Association
1724 Massachusetts Avenue, N.W.
Washington, DC 20036

Wade H. Hardgrove
Brooks, Pierce, McLendon, Humphrey & Leonard, LLP
1600 First Union Capitol Center (27601)
P.O. Box 1800
Raleigh, NC 27602

Kurt A. Wimmer
Covington & Burling
1201 Pennsylvania Avenue, N.W.(20004)
P.O. Box 7566
Washington, DC 20044-7566

Howard F. Jaeckel
CBS Corporation
51 W. 52nd Street
New York, NY 10019

Mark W. Johnson
CBS Corporation
600 New Hampshire Avenue, N.W.
Suite 1200
Washington, DC 20037

Paul J. Sinderbrand
Robert D. Primosch
Wilkinson Barker Knauer, LLP
2300 N Street, N.W.
7th Floor
Washington, DC 20037

Thomas P. Olson
Wilmer Cutler
Counsel for the National Association of
Broadcasters
Wilmer Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037-1420

Thompson T. Rawls, II

Thompson T. Rawls, II